
Significant Amendments Proposed to Delaware General Corporation Law

The Delaware State Bar Association has provided recommendations to the Delaware General Assembly for several amendments to the Delaware General Corporation Law (“DGCL”) relating to the following topics (among others):¹

- **Exculpation of executive officers** – the proposed amendments would allow corporations to include a provision in their certificates of incorporation exculpating certain high-level officers from liability for certain breaches of fiduciary duty.
- **Stock issuances** – the proposed amendments would bring certain provisions of the DGCL relating to stock issuances in line with the corresponding provisions relating to option grants, particularly with respect to delegation of authority.
- **Conversions** – the proposed amendments would reduce the vote required to approve the conversion of a Delaware corporation into another type of entity.
- **Domestication** – the proposed amendments would simplify the domestication of non-U.S. entities into Delaware.
- **Appraisal rights** – the proposed amendments would entitle beneficial owners of stock to exercise appraisal rights directly and would extend appraisal rights to conversion transactions, subject to the “market out” exception.

I. Proposed Amendments

Exculpation of Corporate Officers

Section 102(b)(7) of the DGCL currently allows a corporation’s certificate of incorporation to include a provision that eliminates or limits the personal liability of a director to the corporation or its stockholders for monetary damages for breach of the duty of care, subject to certain limitations. Such protection historically has not been extended to officers, which has led to circumstances where claims based on the same facts were dismissed against directors and upheld against officers or dismissed against an individual in their capacity as a director but maintained in the same individual’s capacity as an officer.

The proposed amendments would address this imbalance by allowing a corporation’s certificate of incorporation to extend such protection to certain specified officers, namely the president, chief executive officer, chief operating officer, chief financial officer, chief legal officer, controller, treasurer or chief accounting officer, any

¹ The text of the proposed amendments may be found [here](#).

“named executive officer” identified in the corporation’s public SEC filings, and any other individual who has consented to service of process under Delaware’s long-arm statute.

As is the case with the exculpation of directors, an exculpation provision covering these officers would be required to be included in the corporation’s certificate of incorporation. The proposed amendments also include some of the same limitations on exculpation as currently apply to directors, *i.e.* they would not exculpate either directors or officers from liability for breaches of the duty of loyalty or for any acts or omissions not in good faith or involving intentional misconduct or knowing violation of law, among others. Notably, however, the proposed amendments would not allow a corporation to exculpate its officers in connection with claims brought by the corporation itself or for derivative claims brought in the name of the corporation.

Delegation of Authority for Stock Issuances

The DGCL currently requires the board of directors to set the terms of options or rights to purchase shares. The proposed amendments would modify Sections 152, 153 and 157 of the DGCL to permit the board (or a duly authorized committee) to delegate its authority to issue or sell stock, options and/or rights to a person or body so long as the board (or committee) adopts a resolution setting forth the following:

- the maximum number of shares, options or rights that may be issued or sold pursuant to the delegated authority,
- the time period during which the issuances or sales may take place, and
- the minimum consideration to be received for such issuances and sales.

In addition, the resolution of the board (or committee) must not permit the delegated person or entity to issue stock, options or rights to themselves. Notably, the proposed amendments would leave in place the provisions of the DGCL that permit the consideration to be paid to be determined based on a formula set forth in the resolutions, such as the market price of the shares at the time of issuance or sale.

Conversion of Delaware Corporations

Section 266 of the DGCL governs the conversion of a domestic corporation into another entity. Currently, unanimous approval of the stockholders (both voting and non-voting) is required for such a conversion. The proposed amendments would provide that a conversion may be approved by the holders of a majority of the outstanding shares entitled to vote on the conversion. In the case of a corporation converting to a partnership with one or more general partners, such conversion also would require the approval of each stockholder who will become a general partner of such partnership. The proposed amendments would also amend Section 262 of the DGCL to give stockholders appraisal rights in connection with such conversions, unless appraisal rights are denied pursuant to the “market out” exception set forth in amended Section 262(b). The market out exception provides that a shareholder does not have appraisal rights if they are receiving stock instead of cash for their shares.

Domestication of non-U.S. Entities

Section 388 of the DGCL governs the process by which a non-U.S. entity may domesticate as a Delaware corporation. Corporate transactions such as mergers, charter amendments, and stock issuances often occur in connection with domestications. The proposed amendments are intended to clarify whether approval by the pre-domestication board and stockholders satisfies the DGCL’s requirements for approval of such transactions by the Delaware corporation.

The proposed amendments would permit a non-U.S. entity to adopt a plan of domestication setting forth the terms and conditions of the domestication, including the manner of exchanging or converting the non-U.S. entity’s equity interests for or into shares of the Delaware corporation. A plan of domestication also could lay out corporate actions to be taken by the domesticated corporation in connection with the domestication, each of which must be

approved prior to effectiveness of the domestication in accordance with the requirements of all applicable non-U.S. laws. Once approved, any corporate action laid out in the plan of domestication that is within the power of a Delaware corporation would be deemed authorized, approved, and adopted by the domesticated corporation and its board of directors, stockholders, or members, and would not require any further action.

Appraisal Rights

Section 262 of the DGCL governs appraisal rights. Currently, only stockholders of record may make a demand for appraisal. The proposed amendments would allow beneficial owners to demand appraisal in their own name, instead of requiring the record holder to make the initial demand on behalf of the beneficial owner. Under the proposed amendments, in order to assert their appraisal rights directly, the beneficial owner must continuously maintain beneficial ownership of the shares and must provide documentary evidence of such ownership.

II. Conclusion

The proposed amendments would make significant changes to the DGCL. Companies are encouraged to consider any potential impact on their corporate documents, as well as on any pending or contemplated transactions, and discuss with counsel as appropriate. If adopted and signed into law, the amendments generally would become effective on August 1, 2022, except for the amendments relating to appraisal rights, conversions and domestications, which would become effective only as to transactions giving rise to appraisal rights, conversions or domestications, as the case may be, entered into on or after August 1, 2022 or if the required authorization thereof is adopted on or after August 1, 2022.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email authors Geoffrey E. Liebmann (partner) at 212.701.3313 or gliebmann@cahill.com; or Sarah Klein-Cloud (attorney) at 212.701.3231 or sklein-cloud@cahill.com; or email publications@cahill.com. Summer Associate Landon Walls also contributed to this memorandum.